No. 97-115



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU AND SOLOMON KAWAAUHAU,
*Petitioners*,

*v.*

PAUL W. GEIGER,
*Respondent.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

## BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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## STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 900 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 150,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the purpose of protecting the rights of consumer bankruptcy debtors.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which can not adequately be addressed by individual member attorneys.

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. For such debtors, a determination that a debt is non-dischargeable in many instances acts as a serious impediment to obtaining a fresh start. In the case of tort liability, such debts are often substantial thereby subjecting the debtor to many years of post-petition wage garnishments and further collection activity. For this reason, *amicus* supports the decision below which narrowly construes the "willful and malicious injury" exception to discharge.

Additionally, NACBA membership is particularly interested in the application of this discharge exception to

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[1] All parties to this case have consented to the filing of this brief. Letters indicating consent have been submitted contemporaneously. This brief has not been approved or financed by any party to this case or their counsel.

the breached security agreement cases. *Amicus* is concerned about potential creditor misuse in consumer bankruptcy cases of a ruling such as the petitioner seeks in this case. A loose standard based on the concept of "reckless disregard" or "knowing disregard" which has found favor with some bankruptcy courts could result in a proliferation of non-dischargeability actions alleging conversion brought by secured creditors with nominally-secured interests in personal property.

## SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals, in the decision below, correctly decided that the respondent's liability was dischargeable. Following the well-established rule that exceptions to discharge must be narrowly construed, the court below applied the language of the statute in a manner which gives effect to its plain meaning. The word "willful" is commonly understood to mean acts which are intentional and deliberate as distinguished from those which are negligent or reckless. Since "willful" modifies the word "injury," § 523(a)(6) excepts from discharge only those acts which are intended to cause injury rather than intentional acts which result in injury.

As such, the court below appropriately developed a standard which incorporates the concept of an intentional tort. Thus, unless a debtor intends to cause the "consequences of his act," or knows or believes that the "consequences are substantially certain to result from it," the debtor has not committed an intentional tort and any liability arising out of the conduct should not be excepted from discharge.

The standard set forth by the court below differs from that found in the pre-Code caselaw. Based on



language in *Tinker v. Colwell* which construed the "willful and malicious injury" language in the 1898 Bankruptcy Act, courts routinely held that debts stemming from a "reckless disregard" or "knowing disregard" of a duty, and from conduct involving "implied malice", were excepted from discharge. This led to decisions in which debts based on mere negligence or recklessness, such as in automobile cases, were found to be non-dischargeable.

The enactment of the Bankruptcy Code changed the landscape upon which the pre-Code cases were decided. If there had been doubt as to the meaning of the "willful and malicious injury" language prior to the enactment of the 1978 Bankruptcy Code, Congress made clear its intent in reenacting the statutory language. In the authoritative Committee Reports accompanying the passage of the Bankruptcy Code, Congress explicitly stated that the word "willful" in the statute is to mean "deliberate and intentional," and to the extent that *Tinker v. Colwell* held that a "less strict" (Senate) or "looser" (House) standard is intended, and to the extent other courts have followed *Tinker* in applying a "reckless disregard" standard, "they are overruled." The meaning of this legislative history could not be more clear.

This legislative intent to overrule the *Tinker* line of cases is bolstered by subsequent amendments to § 523(a). In reaction to cases which followed the 1978 legislative history and concluded that drunk driving injuries are generally not excepted from discharge under § 523(a)(6), Congress enacted a new exception found at § 523(a)(9). By creating a special and limited exception for drunk driving cases, rather than amending or clarifying § 523(a)(6), Congress reaffirmed its prior intent that negligence and recklessness do not fall within the "willful and malicious injury" exception to discharge.

Finally, the thoughtful and well-reasoned decision of the Court of Appeals in this matter should be affirmed in that it is consistent with § 523(a)(6)'s dual purposes of providing debtors a fresh start and protecting victims of intentional torts from discharge of claims based on willful and malicious injuries.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE EXEMPTS FROM DISCHARGE ONLY THOSE DEBTS RESULTING FROM AN INTENT TO CAUSE INJURY.

#### A. *Exceptions To Discharge Should Be Narrowly Construed.*

The principal goal of most bankruptcy cases is the entry of a discharge, a purpose which is consistent with the policy of providing debtors with an opportunity for a fresh start. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The availability of a discharge, however, is not absolute; there are certain limited categories of debts which the Bankruptcy Code deems to be excepted from discharge. 11 U.S.C. § 523(a).

A well-established doctrine in bankruptcy law provides that exceptions to discharge should be narrowly construed. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed...."). *See also In re Klein*, 65 F.3d 749 (8th Cir. 1995); *In re Walker*, 48 F.3d 1161 (11th Cir. 1995); *In re Ward*, 857 F.2d 1082 (6th Cir. 1988); *In re Black*, 787 F.2d 503 (10th Cir. 1986). There is no sound reason why this guiding principle of statutory construction should not be followed in this case.



#### B. *This Court's Inquiry Need Go No Further Than An Examination Of The Plain Language of § 523(a)(6).*

As in all cases of statutory construction, the starting point in this case must be the statutory language. *Toibb v. Radloff*, 501 U.S. 157 (1991); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." *Ron Pair*, 109 S.Ct. at 1031 (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Section 523 (a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." Key to the analysis of this subsection are the words "willful and malicious" in relation to the word "injury." As several courts have correctly noted, including the court below, the word "willful" modifies "injury" in the sentence. *In re Geiger*, 113 F.3d 848, 852 (8th Cir. 1997); *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995); *In re Conte*, 33 F.3d 303, 307 (3rd Cir. 1994); *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985). Given its normal construction, then, the phrase must mean an act which is intended to cause injury rather than simply an intentional act that results in injury. Had Congress intended the latter

construction, the statutory language would more likely have read: "for willful and malicious acts which cause an injury." *Walker*, 48 F.3d at 1164, *quoting In re Hampel*, 110 B.R. 88, 93 (Bankr.M.D.Ga. 1990).

In normal usage, "willful" connotes an act which is done intentionally or knowingly, as opposed to an act done recklessly or negligently. *See* Black's Law Dictionary, 6th Edition. Accordingly, the court below appropriately determined that the statutory language excepts from discharge only those debts which are "based on what the law has for generations called an intentional tort." *Geiger*, 113 F.3d at 852. Referring to the definition of an intentional tort provided in the *Restatement (Second) of Torts*, the court below stated:

> Unless the actor 'desires to cause consequences of his act, or ... believes that the consequences are substantially certain to result from it,' he or she has not committed an intentional tort.

*Id.*, *quoting Restatement (Second) of Torts* § 8A, comment a, at 15 (1965). [2]

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[2] The dissent below notes that while the majority interprets this section of the Restatement to require a subjective intent to injure, it fails to discuss the following statement in comment b:

> If the actor *knows* that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. (emphasis added)

*Restatement, supra*, comment b. This comment fails to support the dissent's argument. The language is consistent with comment a as it still describes a subjective intent.



*Amicus* believes that the standard set forth by the court below is consistent with the plain meaning of the statutory language. [3]

## II. THE LEGISLATIVE HISTORY OF § 523(a)(6) SUPPORTS AFFIRMANCE.

### A. *Tinker v. Colwell And The Pre-Code Caselaw.*

In *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904), this Court interpreted the "willful and malicious injury" language as contained in the Bankruptcy Act of 1898. In finding that liability resulting from the "criminal conversation" of the debtor with the plaintiff's wife was non-dischargeable, this Court used the following language in describing the exception to discharge:

> ... we think a wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be

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[3] The court below did not consider the "malicious" element of the exception as it correctly found that a determination of the "willful" requirement was dispositive in this case. While the application of the malice component is very fact specific, *amicus* notes that the Eighth Circuit has required, at least in the context of the breached security cases, a "heightened level of culpability ... going beyond recklessness." *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985).

> done wilfully and maliciously, so as to come within the exception.
>
> *Id.* at 487, 24 S.Ct. at 509.

Effectively, the *Tinker* court concluded that there are certain kinds of wrongful acts in which "the law implies that there must be malice." *Id.* at 490, 24 S.Ct. at 510.

Based more on the *dicta* rather than the strict holding in *Tinker*, there developed a line of cases which held that a "willful" injury could be established by a showing of the debtor's reckless disregard of duty. [4] *See, e.g., Harrison v. Donnely*, 153 F.2d 588 (8th Cir. 1946) (law may imply that negligent act evincing reckless indifference to rights of others is done intentionally); *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955) (injury from reckless operation of automobile non-dischargeable); *Bennett v. W.T. Grant Co.*, 481 F.2d 664 (4th Cir. 1973) (act of conversion done intentionally in knowing disregard of rights of another is willful and malicious).

### B. *In Enacting The 1978 Bankruptcy Code, Congress Expressly Rejected the Tinker Line of Cases.*

The enactment of the Bankruptcy Code caused most courts to reassess their prior reliance upon the *Tinker* line

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[4] It is worth noting that the *Tinker* court described a "willful" disregard as opposed to a "reckless" disregard, language which is more consistent with the lower court's standard based on an intentional tort rather than with the standard adopted by the cases purporting to follow *Tinker*. Moreover, the actual conduct in question in *Tinker* involved an intentional tort.



of cases. As the Third Circuit recognized, "[t]he landscape has changed in the wake of the 1978 Bankruptcy Code." *In re Conte*, 33 F.3d 303, 306 (3rd. Cir. 1994). Although the "willful and malicious injury" language was incorporated into the Bankruptcy Code, both the House and Senate Committee Reports accompanying the bill contain an explicit statement as to the intent of Congress in reenacting the statutory language. More precisely, the Committee Reports flatly reject the standard perpetuated in the *Tinker* line of cases:

> Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another are nondischargeable. Under this paragraph 'willful' means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled.

Sen. Rept. No. 95-989, 95th Cong., 2d Sess. (1978), 77-99, U.S.Code Cong. & Admin.News 1978, 5787, 5865; also House Rept. No. 95-595, 95th Cong., 1st Sess. (1977), p. 363, U.S. Code Cong. & Admin.News 1978, 5787. [5]

This clear expression of legislative intent resolves that for purposes of § 523(a)(6) analysis, "willful" shall mean an act which is done deliberately or intentionally. This distinguishes those acts which are the product of a "reckless disregard" or a "knowing disregard." Congress

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[5] The House Committee Report is identical to that of the Senate except that the phrase "looser standard" is substituted for the Senate Report's "less strict standard."

noted its dissatisfaction with those cases which had adopted a "less strict" standard based on recklessness and stated that they were overruled. [6] *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985)("[w]e hold that the legislative history of § 523(a)(6) ... expressly establishes Congress's intent to render obsolete *Tinker* and its progeny and to make the "reckless disregard" standard ... inapplicable...."); *Cassidy v. Minihan*, 794 F.2d 340, 343-344 (8th Cir. 1986)("[w]e believe that the report of the Committee on the Judiciary persuasively indicates Congressional intent to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury."); *In re Quezada*, 718 F.2d 121 (5th Cir. 1983).

It is of particular note that the pertinent legislative history came in the form of a Committee Report. In *Garcia v. United States*, 469 U.S. 70, 76 (1984), the Court stated:

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'

*citing Zuber v. Allen*, 396 U.S. 168, 186 (1969), *see also Thornburg v. Gingles*, 478 U.S. 30, (1986).

The petitioners argue that the legislative history overruling the *Tinker* line of cases should be discredited

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[6] While the dissent in the decision below notes that this passage from the legislative history provides only a "brief reference to the meaning of § 523(a)(5)", *Geiger*, 113 F.3d at 857, it is nonetheless pointed and unambiguous.



because Congress did not change the "willful and malicious injury" language when enacting the 1978 Bankruptcy Code, citing to *Kelly v. Robinson*, 479 U.S. 36, 37 (1986) for the view that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." In fact, however, that is exactly what Congress did. It is hard to imagine a more clear expression of legislative intent in overturning prior precedent.

This is not a case, such as in *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365, 380 (1988), where a construction of statutory language differing from pre-Code caselaw is proposed "without even any mention in the legislative history." On the contrary, Congress has spoken loudly and clearly in the legislative history.

## III. SUBSEQUENT AMENDMENTS TO THE BANKRUPTCY CODE REINFORCE THE INTENT OF CONGRESS AS EXPRESSED IN THE 1978 LEGISLATIVE HISTORY.

The creation of a totally new exception to discharge subsequent to the enactment of the Bankruptcy Code provides further evidence of Congress' intent to effectively overrule the *Tinker* "reckless disregard" line of cases. Section 523(a)(9) was added to the Bankruptcy Code as an additional exception to discharge for debts incurred through drunk driving by the Bankruptcy and Federal Judgeship Act of 1984. [7] Had Congress been of the

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[7] In 1990, the Criminal Victims Protection Act made the exception to discharge applicable in Chapter 13 cases. Pub. L. No. 101-647. *See* 11 U.S.C. § 1328(a)(2). Amendments to § 523(a)(9) contained in the

opinion that a "reckless disregard" standard was the proper interpretation of the "willful and malicious" language in § 523(a)(6), then there would have been no need to enact a new exception dealing with drunk driving.

Prior to the enactment of § 523(a)(9), the prevailing view was that debts based on drunk driving liability were not excepted from discharge unless it could be shown that the debtor intended to cause the resulting injury. *See Cassidy v. Minihan*, 794 F.2d 340, 343 (8th Cir. 1986). Essentially, these cases held that while the act of drinking may be intentional, it does not follow that all debtors who injure others while driving drunk have done so with an intent to inflict injury. Rather, it is more common that such accidents fall within the "reckless disregard" concept of tort liability.

For compelling policy reasons, Congress reacted to this line of cases. It is the way in which Congress responded that is of great significance to this case. As a sign that Congress did not believe that drunk driving debts are necessarily the product of a willful and malicious injury, and as an affirmance of its prior legislative history that § 523(a)(6) does not cover injuries resulting from the reckless disregard of the debtor, Congress enacted a new, stand-alone exception to discharge at § 523(a)(9). *See Cassidy v. Minihan, supra*, 794 F.2d at 344 ("... we find it particularly significant that the proposed amendment became section 523(a)(9) of the Code and created a new exception to discharge: it did not amend section 523(a)(6) of the Code.").

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Act also broadened the scope of the exception on the one hand to include unlawful driving while under the influence of a drug or substance and removed the earlier requirement that the debt be evidenced by a judgment, and on the other narrowed it to include only debts for death or personal injury.



In enacting § 523(a)(9), Congress did not intend to simply clarify that drunk driving debts fall within the existing exception in § 523(a)(6), thereby making § 523(a)(9) retroactively applicable, as some courts have held. *See, e.g., In re Adams*, 761 F.2d 1422 (9th Cir. 1985). Such a construction is only supportable if the "willful and malicious injury" language in subsection (a)(6) had been modified or if the amendment was expressly made retroactive. [8] *Cassidy v. Minihan, supra*, 794 F.2d at 344; see also *In re Compos*, 768 F.2d 1155, 1159, f.n. 2 (10th Cir. 1985) (retroactive application of § 523(a)(9) rejected). [9]

In sum, the enactment of the drunk driving amendment reflects the will of Congress to carve out a special exception to fit a particular societal wrong, and not to broaden the scope of § 523(a)(6) to include reckless conduct. [10] *In re Compos, supra*, 768 F.2d 1155, 1158-

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[8] Section 553(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 provided that the amendments to § 523(a) became effective 90 days after the enactment of the Act.

[9] As further evidence that Congress was not simply clarifying that drunk driving dischargeability should be determined under standards established under § 523(a)(6), Congress did not require that such determinations be made solely by the bankruptcy court as is the case for "willful and malicious injury." See 11 U.S.C. § 523(c)(1).

[10] In 1990, Congress enacted the Crime Control Act which added a new exception at § 523(a)(12). Pub. L. No. 101-647. This amendment excepts from discharge debts that arise from a debtor's "malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution...." (emphasis added). Significantly, in describing certain other acts, Congress knew how to say "malicious" and "reckless." If Congress intended to include reckless conduct in § 523(a)(6), it would have said so.

1159 ("...courts have recognized that it is for Congress, not the courts, to amend the Code to make drunk driving debts nondischargeable ... eschew[ing] the temptation to yield to personal preferences....").

## IV. EVEN IF *TINKER V. COLWELL* IS STILL GOOD LAW, REVERSAL IS NOT WARRANTED.

Petitioners urge this Court to reaffirm the holding in *Tinker*, which they claim necessarily compels a reversal of the decision below. A close view of *Tinker*, however, suggests that its holding is not entirely consistent and that it is of limited application beyond its factual setting.

To begin with, while *Tinker* is widely viewed as holding that the "willful" element of the exception may include a "reckless disregard" of a duty, the following excerpt from the case calls this into question and tends to blur the distinction some courts have made between the "willful" and "malicious" elements:

> It is not necessary in the construction we give to the language of the exception in the statute to hold that every wilful act which is wrong implies malice. One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. Thus, he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious.

*Tinker*, 193 U.S. at 489. In the example provided, the act of driving negligently in a crowded thoroughfare would



seem to invoke a "wilful disregard of what one knows to be his duty," yet this is not viewed by the *Tinker* court as reckless enough. Thus, even under a recklessness standard, it not clear in *Tinker* to what degree the act must be sufficiently reckless before malice or willfulness will be implied.

Additionally, the *Tinker* court places great emphasis on the historical significance of the crime and civil tort involved in the case, that of "criminal conversation." Citing to its common law origins, the *Tinker* court refers to the description of criminal conversation in Blackstone as a "civil injury (and surely there can be no greater)..." providing the husband with an "action in trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary." *Tinker*, 193 U.S. at 482. The act was viewed as an injury against both the husband's personal and property rights, [11] an "injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character...." *Tinker*, 193 U.S. at 489-490.

Thus, the *Tinker* court appears to have considered the act under consideration, by its very nature, to have been inherently "willful and malicious," regardless of the circumstances surrounding its commission; and to be far more in the nature of an intentional tort than an act of negligence. The same cannot be said of the negligent acts of Dr. Geiger in this case of medical malpractice. While it is true that Dr. Geiger's treatment of the petitioner

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[11] In this regard, the husband's rights were held to be "of the highest kind, upon the thorough maintenance of which the whole social order rests...." *Tinker*, 193 U.S. at 484.

deviated from the standard treatment, the court below found his conduct to be at best negligent or reckless; and unlike the intentional tort in *Tinker*, he did not believe or know that the injuries were certain or substantially certain to result. The exercise of the respondent's professional judgment, though clearly flawed, did not in the view of the court below reflect the malevolence and depravity that the *Tinker* court found to be manifest "in the very act itself." 193 U.S. at 490.

Even under an objective evaluation of Dr. Geiger's actions, which is advocated by the dissent, the court below observed that the expert testimony in the bankruptcy court did not conclude that the petitioner's injuries were substantially certain to occur based on the treatment provided. *Geiger*, 113 F.3d at 853 ("... [the expert] did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection. We suspect that the course and consequences of an infection are notoriously difficult to predict....").

While the respondent may not be the "unfortunate consumer debtor" that *amicus* member attorneys are accustomed to representing, this case does not warrant the adoption of a less strict standard simply based on the particular identity of the debtor or the type of conduct involved. Congress alone may exercise such prerogative.

## V. THE DECISION BELOW IS SOUNDLY BASED UPON THE BANKRUPTCY CODE'S PURPOSES AND POLICIES.

Affirmance of the standard adopted by the court below is warranted based on the long-standing public



policy goal of affording honest, but unfortunate debtors a discharge from debts and an opportunity to rehabilitate their financial affairs. At the same time, the standard furthers the goal of protecting the victims of intentional and malicious torts from the discharge of claims based on willful and malicious injuries.

*Amicus* is concerned that adoption of a less strict standard than that set forth in the decision below will tip the balance against consumer debtors' interests contrary to the legislative purpose of the Bankruptcy Code and unfairly restrict consumer debtors' opportunity for a fresh start. A broad construction of the exception in § 523(a)(6) will prove to be particularly troubling in the breached security agreement cases.

The effect of a less strict standard in the security agreement context is best shown by cases which have continued to follow *Tinker* despite the 1978 legislative history. In *In re Auvenshine*, 9 B.R. 772 (Bankr.W.D.Mich. 1981), a secured creditor brought a non-dischargeability action based on an alleged conversion of secured property. The bankruptcy court found that the debtors sold a washer and dryer for the sum of $250 so as to raise money for the purchase of an automobile which cost $450. Based on the holding in *Tinker*, the court found that the mere "sale of property subject to a security interest by a debtor without payment of the debt so secured is a willful and malicious act." *Id.* at 775. The court reached this conclusion without making any findings regarding the debtors' knowledge of the security agreement, their intent to harm the creditor, or factors

which would suggest the presence or absence of malice (either implied or actual). [12]

In *United Bank of Southgate v. Nelson*, 35 B.R. 766 (N.D.Ill. 1983), the court stated that it was adopting the "implied malice" standard of *Tinker* in conversion cases. The court concluded that the sale of secured property is a "willful and malicious injury" if the debtor "knows his act would harm the creditors interest...." *Id.* at 776. The debtor's knowledge may be "inferred" from factors such as the debtor's business experience and whether he read or understood the security agreement. *See also, Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257 (11th Cir. 1988) (adopting the implied malice approach set forth in *United Bank of Southgate); In re Collins*, 151 B.R. 967 (Bankr.M.D.Fla. 1993) ("an act performed intentionally with knowledge that it will impair a creditor is done willfully and maliciously").

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[12] Although the court in *Auvenshine* noted its approval of *Tinker*, it conspicuously omitted any reference to the more related Supreme Court precedent of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1935), which if followed would have compelled at least some inquiry into the circumstances surrounding the sale of the secured property. In *Davis*, the Court stated:

> ... a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness and maliciousness.

*Id.* at 332. This language has caused other courts to conclude that a knowing violation of the legal rights of a secured creditor does not establish malice in conversion cases without some additional "aggravated circumstances." *See e.g., In re Long*, 774 F.2d 875, 881 (8th Cir. 1985).



These cases are clearly inconsistent with the standard developed by the court below in this case and its earlier decision in *In re Long*, 774 F.2d 875 (8th Cir. 1985). *See also In re Hodges*, 4 B.R. 513 (Bankr.W.D.Va. 1980). *Amicus* urges affirmance of the decision below so as to effectively overturn the decisions which have continued to apply the *Tinker* reckless disregard and implied malice standards in § 523(a)(6) conversion cases.

Of particular concern to *amicus* is the increasing use of security agreements in connection with revolving charge accounts at large retail consumer stores. For the most part, consumers are unaware that such consumer purchases are secured or they are not familiar with the terms of the security agreements. [13] Retailers, for their part, do not encourage customer awareness of the security obligations and in fact often promote the use of such charge accounts for the purchase of gifts, which necessarily involves the transfer of possession of secured property in violation of such security agreements. Only in the bankruptcy context do such creditors attempt to hold consumers to the letter of these agreements, threatening post-discharge replevin or non-dischargeability actions based on conversion, often as leverage to obtain a reaffirmation agreement from the consumer.

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[13] This was recently observed by the Bankruptcy Review Commission:

> One might expect that secured debts are easily distinguishable from unsecured debts, but this is not always the case. Individuals with retail charge accounts at some stores might be surprised to learn that every purchase they make is technically a 'secured purchase.'

Report of the National Bankruptcy Review Commission, October 20, 1997, Vol. 1, p. 169.

The threat of non-dischargeability actions in this context was recently identified as a serious problem by the National Bankruptcy Review Commission:

> Nominal security agreements play a large part in another context: allegations of conversion to make an ordinary debt nondischargeable. The following example is often used. An individual purchases a birthday present for his mother and some other items on a retail charge card. A week after presenting his mother with the gift, this individual loses his job, and several months later he files for bankruptcy, having not completely paid off his balance on the retail charge card. Some creditors might allege that because the fine print on the receipt made the debtor's purchases secured debts, the debtor committed the tort of conversion when he gave the gift to his mother and therefore the debt to the retailer is nondischargeable under section 523 (a)(6). Although debtors that are able to defend against these lawsuits attain a fair level of success (citations omitted), if debtors cannot afford to litigate or their attorneys are reluctant to take on that task, the debtors are likely to agree to repay these debts by settling the actions or signing reaffirmation agreements.

Report of the National Bankruptcy Review Commission, October 20, 1997, Vol. 1, p. 173.

If the decision below is overturned, this Court will undermine the defenses available to consumer debtors in



such actions. Affirmance will prevent the flood of non-dischargeability conversion actions which are certain to be filed in bankruptcy courts in the wake of a contrary ruling.

## CONCLUSION

For all the foregoing reasons, this court should affirm the decision of the Eighth Circuit.

Respectfully submitted,

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